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No. 85-392

In the Supreme Court of the United States

OCTOBER TERM, 1985

SECURITIES INDUSTRY ASSOCIATION, PETITIONER

v.

COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Glass-Steagall Act (12 U.S.C. 24 Seventh, 78, 377, 378) permits national banks to offer discount brokerage services.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 758 F.2d 739. The opinion of the district court (Pet. App. 4a-19a) is reported at 577 F. Supp. 252. The opinion of the Comptroller of the Currency (Pet. App. 20a-33a) is unreported.

JURISDICTION

The judgment of the courts of appeals was entered on April 12, 1985. On June 25, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 9, 1985; the petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Glass-Steagall Act (Act) (12 U.S.C. 24 Seventh, 78, 377, 378) regulates the securities activities of banks. See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 8-9. Section 16 of the Act (12 U.S.C. 24 Seventh) prohibits the direct involvement of national banks in investment banking services such as underwriting and the purchasing and selling of stock "for [the bank's] own account," but expressly authorizes national banks to engage in certain defined securities activities, including the purchase and sale of securities and stock by the bank acting as agent "for the account of its customers." See *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 625 (1971). Section 21 of the Act (12 U.S.C. 378) "also separates investment and commercial banks, but does so from the perspective of investment banks." *Securities Industry Ass'n* v. *Board of Governors*, No. 82-1766 (June 28, 1984), slip op. 10. That provision (12 U.S.C. 378(a)(1)) prohibits "any person * * * engaged in the business of issuing, underwriting, selling, or distributing * * * stocks, bonds, debentures, notes, or other securities" from "receiving deposits." At the same time, Section 21(a)(1) reaffirms the authority of "national banks * * * [to] purchase[e] and sell[] * * * securities * * * to the extent permitted * * * by the provisions of [Section 16 of the Act]."

While Sections 16 and 21 of the Act regulate the securities activities of national banks (see *Board of Governors* v. *Investment Co. Institute*, 450 U.S. 46, 63-64 (1981)), in Section 20 of the Act (12 U.S.C. 377) Congress separately addressed those activities that banks may engage in through "affiliates." Section 20 prohibits affiliation between a national bank and any "corporation * * * engaged principally in the issue, flotation, underwriting, public sale or distribution * * * of stocks, bonds, debentures, notes or other securities." Similarly, Section 32 of the Act (12 U.S.C.

78) prohibits officers, directors, or employees of any corporation "primarily engaged in the issue, flotation, underwriting, public sale, or distribution * * * of stocks, bonds, or other similar securities" from serving as an officer, director or employee of a national bank.

2. In the summer of 1982, two national banks, Security Pacific National Bank of Los Angeles (Security Pacific) and Union Planters National Bank of Memphis (Union Planters), sought authorization from the Comptroller of the Currency to offer discount brokerage services to the general public through operating subsidiaries.[1] In their applications, both Security Pacific and Union Planters stated that they would not engage in underwriting, would not trade in securities for their own accounts, and would not provide investment advice. See Pet. App. 5a. Their brokerage activities thus would be confined to buying and selling "securities solely as agent, on the order and for the account of customers" (*ibid.*).

On August 26, 1983, the Comptroller approved Security Pacific's application,[2] concluding that the Act permits national banks to offer discount brokerage services.[3] The Comptroller observed that Section 16 permits a national bank to purchase and sell securities and stock " 'for the account of customers, and in no case for its own account,' "

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[1]Discount brokers do not provide investment advice or analysis; they merely execute purchase and sell orders placed by their customers. See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, slip op. 1 n.2; Pet. App. 5a.

[2]The Comptroller approved Union Planters' application shortly thereafter, without opinion (Pet. App. 34a).

[3]The Comptroller also concluded that offices of national banks offering discount brokerage services are not "branches" within the meaning of the McFadden Act (12 U.S.C. 36(f)), and thus are not subject to the geographical restrictions imposed by that statute. See 12 U.S.C. 36(c).

and thus "on its face * * * permits those securities purchases and sales for customers in which the bank acts in the capacity of agent (*i.e.*, brokerage transactions)." Pet. App. 21a. He therefore found that Section 16 "constitutes clear authorization" for national banks to act as discount brokers for the general public (Pet. App. 21a), a conclusion that was supported by the Act's legislative history (*id.* at 24a). The Comptroller acknowledged that "[c]ertain early opinions" of his office had ruled that national banks could purchase and sell securities only on a nonprofit basis to accommodate existing bank customers (*id.* at 21a). But he explained that this early interpretation repeatedly had been relaxed (*id.* at 22a) and long since had been abandoned as "erroneous." *Ibid.*[4]

3. In response to the Comptroller's decisions, petitioner, a trade association of securities brokers, underwriters, and investment bankers (Pet. App. 4a), brought this action in the United States District Court for the District of Columbia. Among other things,[5] petitioner alleged that the Act prohibits national banks from offering discount brokerage services. In particular, petitioner contended that Section 16 of the Act permits national banks to perform brokerage services only as an accommodation for existing bank customers.

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[4]The Comptroller also found that the brokerage activities at issue are not barred by Section 20 of the Act, which prohibits affiliation between national banks and companies "engaged principally in the issue, flotation, underwriting, public sale, or distribution" of securities. He noted that Section 20 does not "include securities brokerage activities" among the list of prohibited securities operations (Pet. App. 26a), and that his reading of Section 20 is consistent with the Act's policies (Pet. App. 26a).

[5]Petitioner also contended that bank discount brokerage offices are "branches" within the meaning of the McFadden Act that are subject to the geographical restrictions of that Act. The district court agreed with this contention. Pet. App. 15a-19a.

The district court rejected petitioner's Glass-Steagall Act claim (Pet. App. 7a-12a). The court explained that "[t]he language of Section 16 limiting bank securities [activities] to those 'for the account of customers' does not limit bank brokerage activity, but serves to distinguish such activity from buying and selling of securities by the bank for its own account" (*id.* at 8a). The Act's legislative history, moreover, far from containing any "mention of limiting bank brokerage activity," affirmatively supports the conclusion that Congress intended to permit national banks to "offer[] brokerage services to members of the general public" (*id.* at 8a-9a).

The court also found meritless petitioner's assertion that the Comptroller had sharply departed from longstanding administrative practice in this case. The court acknowledged that the Comptroller's early opinions had placed limits on the services that a national bank could perform as agent in the purchase and sale of securities (Pet. App. 8a). But the court explained that these early rulings—which reflected " 'an overcautious approach to bank regulation reflecting the atmosphere of the years immediately after the 1929 market crash' " (*id.* at 9a, quoting *New York Stock Exchange, Inc.* v. *Smith*, 404 F. Supp. 1091, 1097 (D.D.C. 1975), vacated on other grounds, 562 F.2d 736 (D.C. Cir. 1977), cert. denied, 435 U.S. 942 (1978))—long since had been abandoned (Pet. App. 9a).[6]

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[6]The court found support for its conclusion in Section 20 of the Act (12 U.S.C. 377), which generally prohibits a national bank from affiliating with any organization engaged principally in underwriting or the public sale or distribution of securities. The court explained that "Section 20 makes clear that the line Congress sought to draw between commercial and investment banking did not prohibit bank affiliated brokerage activity" (Pet. App. 10a). The court also noted that the prohibited activities listed in Section 20 "are * * * fundamentally different from brokerage activities, where the broker buys and sells only as agent and for the account of the customer" (Pet. App. 10a).

By joint motion, the appeal from the district court's decision was stayed pending a decision by this Court in *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, because that case involved "issues concerning construction of the Glass-Steagall Act that are before [the court of appeals]," the disposition of which are "likely to have a direct bearing" upon the Glass-Steagall Act issue presented here. Joint Motion 3. On June 28, 1984, this Court rendered its decision, holding that the Act permits bank holding companies to acquire firms offering discount brokerage services identical to those at issue here. Petitioner nevertheless proceeded with its appeal on the Glass-Steagall Act question.

In a short per curiam opinion, the court of appeals unanimously affirmed the district court's holding that the Act permits national banks to offer discount brokerage services, "generally for the reasons stated in [the district court's] Memorandum Opinion" (Pet. App. 2a). The court of appeals also noted that "the District Court's Glass-Steagall Act analysis receives substantial support from [the] * * * Supreme Court['s] opinion [in] * * * *Securities Industry Ass'n* v. *Board of Gov.* * * *" (*ibid.*).[7]

ARGUMENT

The decision below plainly is correct. In *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), this Court unanimously held that the Act permits banking institutions to offer discount brokerage services to the public. Petitioner's argument cannot be reconciled with that holding. Further review therefore is not warranted.

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[7]The panel divided 2-1 on the question whether discount brokerage offices are "branches" within the meaning of the McFadden Act. That holding is the subject of pending petitions for a writ of certiorari filed by the Comptroller and Security Pacific.

1. In *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, the Court held that Section 20 of the Act (12 U.S.C. 377)—the provision addressing the securities services that may be offered by bank affiliates—does not prohibit a *bank holding company* from acquiring a discount brokerage firm. The Court explained that the Act had been passed as a response to "the heavy involvement of commercial banks in underwriting and securities speculation [that] had precipitated 'the widespread bank closings that occurred during the Great Depression.' " *Id.*, slip op. 12, quoting *Board of Governors* v. *Investment Co. Institute*, 450 U.S. 46, 61 (1981). A banking entity that offers discount brokerage services, however, simply "executes orders for the purchase or sale of securities * * * as agent," and does not function as an underwriter. *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, slip op. 10. Such a banking entity, moreover, presents "[n]one of the more 'subtle hazards' of underwriting" (*id.* at 13, quoting *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 630 (1971)), which "are attributable to the promotional pressures that arise from affiliation with entities that purchase and sell particular investments on their own account." *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, slip op. 13 n.23.[8]

That the Court reached this conclusion was hardly surprising. In recent years, the Court repeatedly has canvassed, in considerable detail, the background and purposes of the

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[8]The Court explained that because a discount broker "trades only as agent, its assets are not subject to the vagaries of the securities markets. Moreover, [its] profits depend solely on the volume of shares it trades and not on the purchase or sale of particular securities. Thus, [the bank holding company] has no 'salesman's stake' in the securities [the discount broker] trades. It cannot increase [the discount broker's] profitability by having its bank affiliate extend credit to issuers of particular securities, nor by encouraging the bank affiliate improperly to favor particular securities in the management of depositors' assets." *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, slip op. 13.

Act. See *Securities Industry Ass'n* v. *Board of Governors*, No. 86-614, slip op. 10-13; *Securities Industry Ass'n* v. *Board of Governors*, No. 82-1766 (June 28, 1984), slip op. 6-10; *Board of Governors* v. *Investment Co. Institute*, 450 U.S. at 61-62; *Camp*, 401 U.S. at 629-634. And the Court repeatedly has concluded that the Act addresses "two general concerns" (*Securities Industry Ass'n* v. *Board of Governors*, No. 82-1766, slip op. 6): it was intended to forestall "[s]peculation in securities by banks and their affiliates" (*id.* at 6), while ending "the various conflicts of interest that Congress feared to be present when a single institution is involved in both investment and commercial banking" (*id.* at 7). As *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, definitively recognized, bank affiliates implicate neither of these concerns when they offer discount brokerage services. See *Camp*, 401 U.S. at 638.

2. Against this background, petitioner has failed to explain how the Act's purposes can be implicated when national banks offer discount brokerage services to the public. And petitioner has failed even to suggest why Congress possibly would have wanted to withhold from national banks the authority to offer discount brokerage services that, according to *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, it unambiguously conferred upon bank affiliates. Instead, petitioner notes only that *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, involved Section 20 of the Act (which regulates bank affiliates), while this case arises under Section 16 (12 U.S.C. 24 Seventh) (which regulates banks themselves). The latter provision, unlike Section 20, expressly authorizes a national bank to purchase and sell securities "solely upon the order, and for the account of, customers, and in no case for its own account." Focusing on the word "customers," petitioner reads Section 16 to provide that a bank may offer

discount brokerage only as a "passive accommodation service[]" (Pet. 7) to banking customers with whom the bank has a pre-existing relationship.

This reading of Section 16 is insupportable. The provision does not condition the word "customers" with the terms "accommodation" or "pre-existing." Instead, as the courts below recognized, the statute by its terms simply distinguishes between permissible brokerage activities on behalf of third parties (that is, "customers") and impermissible "buying and selling of securities by the bank for its own account" (Pet. App. 8a).[9] This interpretation of the statute obviously fulfills the purposes of the Act that have been identified by this Court, and it is the only interpretation that fully comports with the Court's reading of Section 20, with which Section 16 must be read in pari materia. See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, slip op. 13.[10] It also is the only reading that can be

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[9]That certainly is the normal use of the term "customers" in this context. See, *e.g.*, *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, slip op. 10-11 n.18 ("As broker, [a securities firm] buys and sells securities as an agent for the account of customers. In these transactions, it is the customer, rather than the securities firm, who bears the risk of loss").

[10]Relying on this Court's statement that " '[t]here is no basis for assuming that the dissimilar phrases found in §§ 16 and 20 are coterminous' " (Pet. 8, quoting *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, slip op. 12 n.20), petitioner suggests that the Court's interpretation of Section 20 should have no bearing on the proper reading of Section 16. This out-of-context quotation, however, is highly misleading. In the footnote partially quoted by petitioner, the Court rejected petitioner's assertion that the brokerage activities *permitted* national banks by Section 16 are the same as the "public sale" of securities *prohibited* to bank affiliates by Section 20. The Court thus read the two Sections as permitting banks and their affiliates to engage in the *same* types of securities activities. See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, slip op. 12 n.20. Indeed, the Court elsewhere relied on Section 16's grant of brokerage authority to banks in holding that bank affiliates may offer discount brokerage services to the public. *Id.* at 13.

reconciled with Section 16's legislative history. Congress declared flatly that the Act permits national banks "to purchase and sell investment securities for their customers to the same extent as heretofore" (S. Rep. 77, 73d Cong., 1st Sess. 16 (1933)), and there is little doubt that banks sold securities to the general public prior to passage of the Act. See Pet. App. 9a; Smith, *Stock Market Service Comes High*, 21 Am. Bankers Ass'n J. 965 (Apr. 1929).[11]

3. Petitioner also contends (Pet. 8-11) that the Comptroller, in his ruling below, departed from his settled approach in this area. And petitioner seeks to create the impression that federal regulatory agencies are in disarray on the proper scope of bank authority in the discount brokerage field (Pet. 13-15). These contentions are without merit.

Petitioner maintains that the Comptroller's ruling in this case represents a sharp and radical departure from "nearly fifty years" (Pet. 8) of settled administrative practice. At best, this is a remarkable overstatement. The Comptroller

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[11]Petitioner rather surprisingly attempts to draw support from *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, noting that the Court in that case referred to the " 'traditional banking service' " of " 'arrang[ing] the purchase and sale of securities as an accomodation to their customers' "(Pet. 8, quoting *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, slip op. 7). But the Court nowhere suggested that banks had not offered brokerage services to the general public prior to 1933, and it explicitly declined to state "whether § 16 would permit banks to engage in brokerage activity on the behalf of the general public as well as for their own customers" (*id.* at 12 n.20). Indeed, the Court relied on "the fact that § 16 of the Glass-Steagall Act allows banks to engage directly in [discount brokerage services], to accomodate [their] customers" (*id.* at 13), in ruling that bank affilates may offer discount brokerage services to the general public; if the Court meant this language to suggest that Section 16 permits banks to offer only passive accomodation services to pre-existing customers, it hardly could have relied on that provision to support its holding on the scope of Section 20.

candidly acknowledged that his earliest opinions permitted banks to offer brokerage services only to pre-existing customers on a nonprofit basis (Pet. App. 21a). But these restrictions were relaxed in 1948 and 1957, and were "deleted entirely" in 1963 when the Comptroller's *Digest of Opinions* was superseded by the *Comptroller's Manual for National Banks* (Pet. App. 21a-22a). In 1974, the Comptroller undertook a comprehensive reexamination of his regulation of bank brokerage activities, and explained:

> The office position from 1936 to 1957 was that it was inconsistent with the idea of an 'accommodation' service for a bank to make a profit on such services. These old rulings did not reveal the rationale for concluding that a bank service expressly authorized by Congress, could not be marketed in the ususal fashion. This view, like many others expressed by bank regulators, in the immediate post-depression decades, was designed to be ultra-conservative and to confine banks as narrowly as possible in their activities. However, in this regard, the office apparently went further in the name of conservatism than did the Congress, since neither the word nor the idea of the 'accommodation' limitation appears in the statute or in any committee or floor comments.

[1973-1978 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 96,272, at 81,358 (June 10, 1974). Thus, as the Comptroller explained below, his decision in this case follows logically from his prior application of the Act (Pet. App. 22a-23a).[12]

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[12]That the Comptroller's position has changed over time does not, as petitioner suggests (Pet. 11), mean that his view is entitled to little deference. This Court repeatedly has explained that "[t]he fact that the agency has from time to time changed its interpretation * * * does not * * * lead us to conclude that no deference should be accorded the agency's interpretation of the statute. * * * On the contrary, the agency * * * must consider varying interpretations and the wisdom of its

The actions of other federal agencies, moreover, are entirely consistent with the Comptroller's decision here. The Securities and Exchange Commission proposal cited by petitioner (Pet. 14) at two points expressly declined to state "any views on the legality of particular bank securities activities under the Glass-Steagall Act or other banking laws." 48 Fed. Reg. 51930 n. 1 (1983); see *id.* at 51931 n.15. And while petitioner hints (Pet. 15) that the Board of Governors of the Federal Reserve System (Board) might have some objection to the Comptroller's action here, that is not the case; it was the Board's order permitting a bank holding company to acquire a discount brokerage firm that was upheld in *Securities Industry Ass'n* v. *Board of Governors,* No. 83-614. See 69 Fed. Res. Bull. 105 (1983).[13]

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policy on a continuing basis." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 25. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968); *American Trucking Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967). And here, the Comptroller "has articulated with commendable thoroughness" the reasons supporting his decision. *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, slip op. 8; see *id.* at 10 n.16.

Petitioner also contends (Pet. 9-10, 11) that Congress relied on and implicitly ratified the Comptroller's original "accommodation" interpretation in 1935 when it amended Section 16 to permit banks to purchase and sell "securities and stock," rather than only "investment securities," for customers. Banking Act of 1935, ch. 614, § 303, 49 Stat. 707. Congress, however, placed no "accommodation" limitation in the statute at that time. In any event, it is difficult to see why an amendment in terms *broadening* the powers of banks should be read to narrow what had been the plain congressional intent at the time of the enactment of Section 16 in 1933.

[13]Petitioner attempts to create the impression (Pet. 12-15) that the Comptroller's decision is inconsistent with Congress's views and is contributing to chaos in the banking industry. The authority that petitioner cites for these propositions, however, is entirely off the point. The legislative activity (Pet. 12-13 & nn. 16, 17) and litigation (Pet. 13 nn. 18, 19) mentioned by petitioner are unrelated to the Comptroller's decision in this case. Congress has not disapproved, as petitioner seems

4. In short, after this Court's recent decision in *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614, the question presented by petitioner is insubstantial. Unless a conflict on the point develops in the circuits,[14] then, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

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to suggest (Pet. 12-13), the proposition that banks may offer discount brokerage services; instead, the authority cited on this point by petitioner indicates only that Congress has declined to relax the Act's basic restrictions on bank underwriting activities. See *Securities Industry Ass'n* v. *Board of Governors*, No. 82-1766, slip. op 15-16. And petitioner's argument that the Comptroller's decision improperly erodes "the established boundaries between the securities and banking industries" (Pet. 15; see *id.* at 13) simply disregards the import of this Court's decision in *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614.

[14]As we explain in our petition for a writ of certiorari (*Clarke* v. *Securities Industry Ass'n*, No. 85-971) from the McFadden Act aspect of the holding below (see note 7, *supra*), the Comptroller always may be sued in the District of Columbia (see 28 U.S.C. 1391(e)); because the precedent in that Circuit is now unfavorable to the Comptroller on the McFadden Act issue, it may be anticipated that a conflict among the circuits never will develop on that issue. Petitioner and other bank competitors retain the option of suing the Comptroller in other districts, however, which will give other circuits an opportunity to address the Glass-Steagall Act question.